STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

BROADCAST DESIGN & CONSTRUCTION, INC., a Michigan Corporation,

Plaintiff,

vs. Case No. 2005-3377-CK

GM ENGINEERS AND CONTRACTING, INC., d/b/a GM ENGINEERS AND ASSOCIATES, a Michigan corporation,

Defendant.
_____/

OPINION AND ORDER

Defendant moves for summary disposition.

Plaintiff filed its complaint on August 23, 2005. Plaintiff alleges that it entered into several contracts with defendant GM Engineers and Contracting, Inc. ("GME"), which plaintiff agreed to furnish services in connection with improvements made to property in which defendant was the construction manager. Plaintiff alleges it has performed all obligations under the contracts, and has received certain partial payments, leaving a balance of $41,394.17 through August 30, 2004, plus accruing interest. Plaintiff brings claims for breach of contract (count I); account stated (count II); and breach of the Builders Trust Fund Act, MCL 570.151 (count III).

On October 21, 2005, defendant GME filed a third-party complaint against Garcia & Sons Masonry ("Garcia"), its owner and insurers. GME alleges that it had contracted with Garcia to perform certain work. GME alleges Garcia performed the work negligently, forcing plaintiff BDC to demolish and reconstruct the work before it could perform its work. GME

brings claims for breach of contract (count I); negligence (count II); and indemnity/hold harmless agreement (count III).

The parties stipulated to dismiss third party defendants Accident Fund and Burlington Insurance Company in an order dated February 7, 2006. On February 10, 2006, a default judgment against third party defendants Garcia & Sons Masonry, Inc., and Ignacio Garcia was entered. On February 16, 2006, third party defendant Northern Insurance Company of New York was dismissed in a stipulated order. Defendant GME now moves for summary disposition of the primary complaint against it.

Defendant GME asserts, first, that because it submitted a counter-affidavit demonstrating that there is no account stated (count II), this count is to be considered merged into the breach of contract claim (count I). Further, defendant GME asserts that plaintiff appears to have abandoned its breach of the Builder's Trust Fund claim (count III), as it does not apply. Thus, defendant asserts, the breach of contract claim remains the only viable one.

Defendant GME contends that in this case plaintiff, subcontractor to defendant, sues for payment on invoices relating to work outside the original scope of work on the job. Defendant maintains that plaintiff failed to abide by the express contract which stipulates that all additional work required a signed written change order before payment could be processed. Defendant asserts that plaintiff did not obtain written change orders for the extra work, and neither the owner nor the architect approved the changes, and therefore defendant was unable to pay for same. Defendant argues that under the unambiguous express agreement, defendant is not liable to plaintiff.

Defendant contends James Brennan, representative of plaintiff, stated in deposition that the Agreement controlled all of plaintiff's work completed on site. Second, defendant asserts

that Brennan admits that he knew that signed written change orders were necessary, and in fact submitted two change orders that were accepted. GME contends Brennan further knew that Gil Manly of GME was attempting to push through additional change orders with the owner and architect, but they both rejected same. Moreover, defendant asserts that while plaintiff asserts that each individual timesheet submitted to and signed by GME's on-site supervisor are really "Time and Material" contracts, the deposition testimony of Gil Manly, Virgil Manly, Jim Brennan and Jim Degowske do not support this theory. Defendant GME asserts that to so find would be to abrogate the written agreement and replace it with multiple "T&M" contracts with no agreement. Further, defendant asserts, even assuming that each T&M sheet was a contract, Virgil Manly, the individual from GME who signed the bottom of each timesheet, is not and never has been an officer of GME that could legally bind GME to any contract.

Plaintiff responds, first, that it was awarded a contract in the amount of $2,756.00 to form and pour spread footing, re-steel 3,500 lb of concrete. Plaintiff asserts its original bid was for $3,156, but defendant wanted it reduced by $400 because they had another subcontractor who would do the excavation. Plaintiff asserts that when its employee arrived, the site was not ready because the company hired to do the excavation had failed to appear. Therefore, plaintiff asserts, defendant executed a change order for $400, and the work was performed by plaintiff in the middle of June 2004.

Plaintiff contends that it performed all work under the contract and change order satisfactorily, thereby completing all of their obligations under the written contract. At that point, plaintiff asserts, the contract was completed and there was no contractual relationship between the parties. Plaintiff notes that the prior written contract, under "Changes," refers specifically to changes to "the work specified in the contract."

In the meantime, plaintiff asserts, Garcia was hired to perform the masonry work and construct the walls. At some point, GME's project manager, Virgil Manly, son of the owner, discovered the masonry work was done improperly. Plaintiff contends Garcia was fired in July of 2004, and plaintiff was called back to do repair work as to the masonry. Plaintiff maintains GME did not request a bid for the work, did not ask for an estimate of the work, but only requested plaintiff come and repair the work. Plaintiff maintains that the additional repair work had nothing to do with the work specified in the contract, for which change orders would be needed.

Plaintiff asserts that Virgil Manly signed the T&M sheets on a daily basis, and that no one from defendant GME ever objected verbally or in writing to any of the time and material charges. Further, plaintiff asserts that Gil Manly was attempting to get work order changes from the owner; this was relayed to Jim Brennan of BDC who understood this could take some time. In the meantime plaintiff continued working. Plaintiff maintains that when BDC was hired on a time and material basis to perform this work, plaintiff did not do it on a contingency basis. That is, while the change order request was to allow defendant GME to obtain additional funding from the owner, its approval or disapproval had no bearing on GME's obligation to plaintiff.

With regard to the argument that Virgil Manly had no authority and could not bind defendant GME, plaintiff notes that Virgil Manly held himself out as Project Manager, and all of the T&M sheets bear his signature over the wording "authorized by." Further, plaintiff asserts, despite having received regular faxed and mailed copies of the T&M sheets, GME owner Gil Manly never indicated to plaintiff that Virgil Manly did not have authority to order work to be performed.

Defendant moves for summary disposition pursuant to MCR 2.116(C)(10). A (C)(10) motion tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or other documentary evidence. *By Lo Oil Co v Department of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence. *By Lo Oil*, 26. The trial court is required to consider the submitted documentary evidence in the light most favorable to the party opposing the motion. *By Lo Oil Co*, 26. If the moving party satisfies its burden of production, the motion is properly granted if the opposing party fails to proffer legally admissible evidence that demonstrates that a genuine issue of material fact remains for trial. *By Lo Oil Co*, 26-27.

As a preliminary matter, the Court notes that plaintiff does not dispute in this motion that count I, breach of contract, is the only viable claim in this case. "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 197; 702 NW2d 106 (2005). In light of this cardinal rule, and to effectuate the principle of freedom of contract, the Supreme Court has generally observed that "[i]f the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning; but if it is ambiguous, testimony may be taken to explain the ambiguity." *Grosse Pointe Park*, 197-198. "However, we will not create ambiguity where the terms of the contract are clear." *Grosse Pointe Park*, 198.

The parties present Contract Agreement #2004-22, dated April 26, 2004, between GME and plaintiff BDC. "Article 1. Work" specifies the work to be performed, i.e., form and pour

spread footing, re-steel 3500 lb concrete, GME Job # 24-0322-684, for the amount of $2,756.00.

"Article 3. Changes" provides as follows:

> No additions, deletions, or deviations *from the work specified in the contract* will be permitted or paid for unless a written work or change order is first agreed upon and signed by the owner, general contractor, and architect. (Emphasis added.)

Giving the language its ordinary, plain meaning, the Court is persuaded that the "Changes" provision refers the work specified in the contract, i.e., form and pour spread footing, re-steel 3500 lb concrete, for $2,756.00. Whether the additional work performed relates to the work specified is not apparent on the face of the contract and is an issue to be resolved by the trier of fact. Plaintiff has produced the affidavit of Jim Brennan, its vice president and overseer of this project, who swears that none of the work BDC was requested to repair was part of BDC's original contract with GME. The Court is satisfied plaintiff has thus met its burden to show that the work was not part of the original contract. As stated, this issue will need to be resolved by the finder of fact.

Moreover, the Court notes that while the movant flatly asserts that Virgil Manly had no authority to bind GME, defendant GME provides no documentary support for this assertion. Plaintiff provides, again, the affidavit and deposition testimony of Brennan, who swears that GME's owner, Gil Manly, advised him that his son, Virgil Manly, would be overseeing the repairs, that time and material sheets were signed and authorized by Virgil Manly, and that Gil Manly received a copy of same. Brennan further asserts that Virgil Manly advised him that in GME's contract with Center Line, there was a penalty provision for every calendar day beyond the completion date; hence, BDC used its best effort to assist GME to meet its deadline to avoid a penalty. The Court is satisfied that Virgil Manly's status as agent and/or authority to bind GME is a question of fact.

For the foregoing reasons, defendant GME's motion for summary disposition is DENIED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

IT IS SO ORDERED.

Honorable Robert J. Chrzanowski P11875
In absence of
Honorable Mary A. Chrzanowski P39944

Dated: MAY 18 2006

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Carmella Sabaugh
COUNTY CLERK
BY DEPUTY CLERK